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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. ——

THE UNITED STATES OF AMERICA, PETITIONER

v.

C. O. MASON, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

The Solicitor General, on behalf of the United States, prays that a writ of certioriri issue to review the judgment of the United States Court of Customs and Patent Appeals entered in these cases on June 18, 1964.

OPINIONS BELOW

The opinions of the Customs Court are reported at 49 Cust. Ct. 89, 129, 132 and 135. The opinion of the Court of Customs and Patent Appeals (App. 1a) is reported at C.A.D. 844.[1]

[1] In the Customs Court, this litigation involved four separate cases, with four majority opinions being written. Consequently, four appeals, with four separate printed records, were prosecuted to the Court of Customs and Patent Appeals. They were *United States* v. *C. O. Mason, Inc.* (Customs Appeal No. 5130); *United States* v. *Bordas & Company* (Customs Appeal No. 5133); *United States* v. *Guillermo Arbona Coll, Inc.* (Cus-

JURISDICTION

The judgment of the Court of Customs and Patent Appeals was entered on June 18, 1964 (App. 11a). By an order of the Chief Justice, dated September 15, 1964, the time for filing a petition for a writ of certiorari was extended to and including November 15, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1256.

QUESTION PRESENTED

Whether Section 514 of the Tariff Act of 1930, 19 U.S.C. 1514, providing that any protest of a tariff determination ("liquidation") by the Collector of Customs shall be filed within sixty days after the liquidation, is applicable to protests asserting that the liquidation was based upon an unconstitutional statute.

STATUTES INVOLVED

1. Section 505 of the Tariff Act of 1930, 46 Stat. 732, 19 U.S.C. 1505, provides:

> The consignee shall deposit with the collector, at the time of making entry, unless the mer-

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toms Appeal No. 5134); and *United States* v. *Pan American Standard Brands, Inc., Geo. Sanders & Co., Inc.* (Customs Appeal No. 5135). However, the Court of Customs and Patent Appeals considered the cases as one and rendered a single opinion. For this reason, and because the facts and issues are identical, we are filing a single petition for certiorari encompassing all four cases.

"R." references in this petition are to the four printed records in the Court of Customs and Patent Appeals. *E.g.*, "R. Mason" refers to the printed record below in *United States* v. *C. O. Mason, Inc.* (Customs Appeal No. 5130).

"*App.*" references are to the appendix to this petition, *infra*, pp. 1a–11a.

chandise is entered for warehouse or transportation, or under bond, the amount of duty estimated to be payable thereon. Upon receipt of the appraiser's report and of the various reports of landing, weight, gauge, or measurement the collector shall ascertain, fix, and liquidate the rate and amount of duties to be paid on such merchandise as provided by law and shall give notice of such liquidation in the form and manner prescribed by the Secretary of the Treasury, and collect any increased or additional duties due or refund any excess of duties deposited as determined on such liquidation.

2. Section 514 of the Tariff Act of 1930, 46 Stat. 734, 19 U.S.C. 1514, provides:

> Except as provided in subdivision (b) of section 516 of this Act (relating to protests by American manufacturers, producers, and wholesalers), all decisions of the collector, including the legality of all orders and findings entering into the same, as to the rate and amount of duties chargeable, and as to all exactions of whatever character (within the jurisdiction of the Secretary of the Treasury) * * * under any provision of the customs laws, and his liquidation or reliquidation of any entry, * * * shall, upon the expiration of sixty days after the date of such liquidation * * * be final and conclusive upon all persons (including the United States and any officer thereof), unless the importer, consignee, or agent of the person paying such charge or exaction * * * shall, within sixty days after, but not before such liquidation * * * file a protest in writing with the collector setting

> forth distinctly and specifically, and in respect to each entry, payment, claim, decision, or refusal, the reasons for the objection thereto. * * *

3. Section 515 of the Tariff Act of 1930, 46 Stat. 734, 19 U.S.C. 1515, provides:

> Upon the filing of such protest the collector shall within ninety days thereafter review his decision, and may modify the same in whole or in part and thereafter remit or refund any duties * * *. If the collector shall, upon such review, affirm his original decision, * * * then the collector shall forthwith transmit the entry and the accompanying papers, and all the exhibits connected therewith, to the United States Customs Court for due assignment and determination, as provided by law. * * *

STATEMENT

Under Section 505 of the Tariff Act of 1930, 19 U.S.C. 1505, *supra*, p. 2, the consignee of imported merchandise is required to deposit with the Collector of Customs, at the time of entry, the amount of duty which the Collector estimates is payable. Later, after receiving appraiser's and other reports, the Collector determines precisely the rate and amount of the duties owed. This is called "liquidating" the rate and amount of duties. He then gives the consignee notice of the liquidation and collects any additional duties due or refunds any excess which has been deposited.

Section 514 of the Act, 19 U.S.C. 1514, *supra*, p. 3, provides that this liquidation by the Collector "shall

upon the expiration of sixty days after the date of such liquidation, * * * be final and conclusive upon all persons * * *, unless the importer, consignee, or agent of the person paying such charge or exaction * * * shall, within sixty days after, but not before such liquidation * * * file a protest in writing with the collector * * *." Section 515, 19 U.S.C. 1515, *supra*, p. 4, goes on to provide that upon the filing of a protest, the Collector shall review his prior decision; if he affirms it, he is to transmit the entry and all exhibits to the Customs Court for a determination of the dispute by that court.

The merchandise involved in the instant litigation consists of ground coffee and raw coffee which was imported into San Juan, Puerto Rico, at various times between April, 1957, and December, 1959 (App. 3a). The Collector liquidated the entries of ground and raw coffee between June, 1957, and December, 1959, at 36 cents a pound and 30 cents a pound, respectively (App. 3a–4a), the rate set by the Puerto Rican Secretary of Agriculture under an attempted delegation of rate-setting power by the Legislature of Puerto Rico.[2] No protests were filed within sixty days after these liquidations (App. 4a).

On September 15, 1959, the Customs Court decided *Pan American Standard Brands, Inc.* v. *United States*, 43 Cust. Ct. 122, holding unconstitutional, as an unlawful delegation of power by the Puerto Rican

[2] Act No. 95, 13 L.P.R.A. 2201 (supp.). Section 1319 of Title 19, in turn, vests the Legislature of Puerto Rico with power to impose duties on coffee imported into Puerto Rico.

Legislature, the provision of Act. No. 95, which empowered the Puerto Rican Secretary of Agriculture and Commerce to raise or lower the duties on coffee.[3] Following that decision, respondents filed protests in the present cases asserting that the duties of 36 cents and 30 cents per pound on coffee were erroneous because based upon the statute held unconstitutional (R. Mason 7–8; R. Bordas 7–9; R. Coll. 7–9; R. Pan American 8–9). Each protest was filed after the expiration of the sixty-day period from the date of liquidation.

The United States moved to dismiss all of the protests as untimely. The Customs Court, with one judge dissenting, denied the government's motion, holding that because the Collector's liquidations were based upon an unconstitutional statute they were absolutely null and void, and that, therefore, there had been no liquidation to start the running of the sixty-day period of limitations (R. Mason 16–24).[4] It distinguished between "a liquidation which is legal, although erroneous and voidable as such, and one which is illegal and absolutely void" (R. Mason 21). The court entered a judgment dismissing the protests as premature and ordering the Collector to "liquidate the entries herein so that a timely

[3] The United States did not appeal from the decision because the Puerto Rican Government was at that time reviewing the matter of duties on coffee in contemplation of new legislation, and thus it did not then appear that the case would have any prospective importance.

[4] The principal opinion of the Customs Court was filed in *United States* v. *C. O. Mason, Inc.* The opinions in the other three cases merely referred to the Mason opinion.

protest may be filed against the liquidations if so desired" (R. Mason 26). On appeal, the Court of Customs and Patent Appeals affirmed, basically adopting the theory applied by the Customs Court.

REASONS FOR GRANTING THE WRIT

The decision below is, we believe, plainly wrong. It will operate to defeat, to a significant extent, the policies of repose which are embodied in the limitations period found in Section 514 of the Tariff Act. Even if it is not followed by other courts, the consequences in the Court of Customs and Patent Appeals will be to unsettle matters which, under the statute, have long since been finally disposed of and open the courts to an indeterminate amount of stale litigation. If followed by other courts, the decision below would have an even more serious impact on the course of litigation and administration under federal statutes.

1. Section 505 of the Tariff Act of 1930 requires an importer to pay the amount of duty determined by the Collector in his "liquidation." Section 515 establishes an administrative and judicial procedure for obtaining a refund of any amount erroneously collected. Section 514, an ordinary statute of limitations, is an integral part of the statutory procedure for review. It makes the "liquidation" final unless the importer initiates administrative and judicial review proceedings within sixty days by filing a protest with the Collector.

Sections 514 and 515 together provide the exclusive mode of review for all claims of erroneous liquidation

and overpayment of duties, whether the asserted error was slight or flagrant, factual or legal, within the general area of the collector's authority or plainly unauthorized. In each of these cases, review under Section 515 must be initiated by filing a protest with the Collector within sixty days of the liquidation. There is, we submit, no basis for a distinction where the erroneous ground of the Collector's determination is that he proceeded under an unconstitutional statute. If the Collector takes action under the purported authority of an unconstitutional statute, his action is simply unauthorized and erroneous. It is in no relevant way different from any other action erroneously taken in excess of statutory authority. Like any other error it can be reviewed, and corrected, only through the procedures and in compliance with the time limits of Sections 514 and 515.

The principles involved are identical to those applied in the many decisions holding that where the legislature prescribes a particular procedure for challenging the action of governmental officials or agencies that procedure must be followed, even where the challenge is upon constitutional grounds. *Bradley* v. *Richmond,* 227 U.S. 477, 485; *First Natl. Bank* v. *Weld County,* 264 U.S. 450; *Anniston Mfg. Co.* v. *Davis,* 301 U.S. 337, 342–346; *Yakus* v. *United States,* 321 U.S. 414, 434–435. Similarly, where Congress has provided a time limit as an integral part of a statutory procedure for the assertion of a class of claims, the Congressional determination must be accepted and followed even if a claim raises a constitutional issue. *Soriano* v. *United States,* 352 U.S. 270.

The Court of Customs and Patent Appeals, invoking the provision in Section 505 of the Tariff Act, *supra*, pp. 2–3, that the Collector shall "liquidate the rate and amount of duties to be paid on such merchandise as provided by law." reasoned that liquidations based upon an unconstitutional statute were not liquidations "as provided by law," and, that, therefore, there existed no such "liquidations" as would start running the period of limitations set forth in Section 514 of the Act (App. 9a). However, the same could be said of any erroneous liquidations by the Collector. For example, if the Collector based his decision on an inapplicable statutory provision, or if he misconstrued a statute or proclamation and thereby improperly classified the merchandise, or if he acted whimsically in choosing a rate, it could just as well be said that the liquidations were not "as provided by law." The very purpose of the right of action granted importers and consignees by Sections 514 and 515 of the Act is to give them an opportunity to test whether or not the Collector's liquidations are "as provided by law." [5]

[5] Both the Customs Court (R. Mason 21–22) and the Court of Customs and Patent Appeals (App. 7a) relied upon cases holding that where the notice of liquidation was not given, the statute of limitations would not begin to run. Obviously, these cases are not in point. Where the Collector commits a procedural error which prevents the importer or consignee from bringing a timely action, the government should not be able to take advantage of its own error by interposing the limitations defense. In such a case, the importer or consignee has not "slept" on his rights. But the principle of those cases has no application here, where the respondents had notice of the Collector's liquidations and chose to forego filing protests within the statutorily prescribed period.

The language of Section 514 of the Act confirms our view. That Section provides that "*all* decisions of the collector, *including the legality of all orders and findings entering into the same,* as to the rate and amount of duties chargeable, and as to *all* exactions of whatever character * * * and his liquidation or reliquidation of *any* entry * * * shall, upon the expiration of sixty days after the date of such liquidation, reliquidation, decision, or refusal, be final and conclusive upon all persons" unless a protest is filed within sixty days after "such liquidation, reliquidation, decision, or refusal * * *." (Emphasis supplied.) No plainer language could be employed to indicate that *all* determinations of the Collector, regardless of their basis, are to be final and conclusive unless challenged within sixty days.

2. The decision below is inconsistent with well settled principles in the application of statutes of limitation. "Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost." *Chase Securities Corp.* v. *Donaldson,* 325 U.S. 304, 314. This policy has nothing to do with the underlying merits of a claim. A claim may be stale, memories may have faded, witnesses may have disappeared, and evidence may have been lost, all to the same degree where a claim is based

upon the unconstitutionality of a statute as where it is based upon some other asserted error in the action giving rise to the claim.[6]

We know of no precedent for an exception to statutory limitations such as that created by the court below. What precedent there is is directly to the contrary. In *Kavanagh* v. *Noble,* 332 U.S. 535, a taxpayer filed a refund claim after the expiration of the applicable two-year limitations period, contending that the Collector of Internal Revenue had based his assessment upon a regulation that had been declared "void" two months previously in *Helvering* v. *Janney,* 311 U.S. 189. This Court held the action to be time-barred, saying (332 U.S. at 538–539):

> It may well be that the taxpayer's refund claim was prompted by this Court's decision in *Helvering* v. *Janney, supra,* which set aside the Treasury regulation upon which the deficiency assessment was based. * * * But assuming that the *Janney* decision makes clear that the taxpayer here made an overpayment, the loss which he now suffers from an application of § 322(b)(1) is a loss which is inherent in the application of any period of limitations. Such periods are established to cut off rights, justifiable or not, that might otherwise be asserted and they must be strictly adhered to by the judiciary.

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[6] The reference in the *Chase* case to evidence having been lost is particularly apt here. Some of the entries involved in the instant case have been destroyed in accordance with a governmental schedule of records control (App. 10a).

See, also, *Leffingwell* v. *Warren*, 2 Black 599, 604–606. Similarly, this Court has held that claims for damages under the "taking" clause of the Fifth Amendment must be filed within the prescribed period of limitations. See, *e.g.*, *Soriano* v. *United States*, 352 U.S. 270.

3. The decision below is of importance both in its immediate application to the customs, patent, and trademark cases within the jurisdiction of the Court of Customs and Patent Appeals and in the threat it poses as a precedent which may be applied to other federal statutes by other courts.

While decisions holding tariff statutes unconstitutional are rare, four Presidential Proclamations setting duties have been declared "void" in recent years.[7] On the basis of the holding in the instant case, protests that would otherwise be untimely have recently been filed with respect to merchandise covered by one of those proclamations.[8] It is anticipated that, if the

[7] Presidential Proclamation No. 3211 (T.D. 54493), setting duties upon clothespins, was held void in *Falcon Sales Co., et al.* v. *United States*, 47 Cust. Ct. 129; Presidential Proclamation 3108 (T.D. 53883), establishing duties on bicycles, was declared void in *United States* v. *Schmidt Pritchard & Co., et al.*, 47 CCPA 152; Presidential Proclamation 3084 (T.D. 53755), on shelled peanuts, was held invalid in *United States* v. *The Best Foods, Inc.*, 47 CCPA 163; and Presidential Proclamation 3095 (T.D. 53808), also relating to peanuts, was declared invalid in *The Best Foods, Inc.* v. *United States*, 50 Cust. Ct. 94.

[8] *Cajo Trading, Inc.* v. *United States*, Protest 63/7627, involving untimely protests on clothespins. The Customs Court is withholding decision in that case pending the final resolution of the instant litigation.

decision below stands, other importers of merchandise subject to these proclamations will also attempt to take advantage of the holding below. The ground of the decision below would presumably be applied by the court to patent and trademark cases as well. Another unsettling aspect of the decision is that it opens the door to constitutional attacks upon countless tariff provisions which are not even currently operative and permits indefinite delay in challenging provisions now on the books.

Moreover, the significance of the principle announced by the court below obviously transcends customs litigation. Section 514 of the Tariff Act of 1930 is an ordinary statute of limitations, dating the period for bringing a claim based on the error of a government official or agency from the time of the official action. Reasoning identical to that adopted below could equally be asserted as the justification for entertaining otherwise time-barred suits under the Tucker Act, the Suits in Admiralty Act, and any number of other federal statutes granting a right of action to remedy the erroneous decision of a federal official or administrative agency. All that would be required would be a contention that the official or agency had acted on the basis of an unconstitutional statute or regulation.

CONCLUSION

In light of the importance of the question and the error inherent in the Court of Customs and Patent Appeals' decision, it is respectfully submitted that

this petition for a writ of certiorari should be granted and the decision below reversed.

ARCHIBALD COX,
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NOVEMBER 1964.

APPENDIX

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

October Term, 1963

Customs Appeal No. 5130

THE UNITED STATES, APPELLANT

v.

C. O. MASON, INC., APPELLEE

October Term, 1963

Customs Appeal No. 5133

THE UNITED STATES, APPELLANT

v.

BORDAS & COMPANY, APPELLEE

October Term, 1963

Customs Appeal No. 5134

THE UNITED STATES, APPELLANT

v.

GUILLERMO ARBONA COLL, INC., APPELLEE

October Term, 1963

Customs Appeal No. 5135

THE UNITED STATES, APPELLANT

v.

PAN AMERICAN STANDARD BRANDS, INC.,
GEO. SANDERS & CO., INC., APPELLEES

June 18, 1964

MARTIN, Judge.

These four appeals are from four judgments of the United States Customs Court, Third Division (C.D. 2364, C.D. 2373, C.D. 2372 and C.D. 2371), dismissing protests against the liquidations of the Collector of Customs at San Juan, Puerto Rico, assessing the duty on entries covering coffee imported into Puerto Rico, and ordering the collector at San Juan to liquidate the entries so that timely protests may be filled against the liquidations if so desired. The authority of the collector to liquidate derives from section 505 of the Tariff Act of 1930 which reads:

> The consignee shall deposit with the collector, at the time of making entry, unless the merchandise is entered for warehouse or transportation, or under bond, the amount of duty estimated to be payable thereon. Upon receipt of the appraiser's report and of the various reports of landing, weight, gauge, or measurement the collector shall ascertain, fix, and liquidate the rate and amount of duties to be paid on such merchandise as provided by law and shall give notice of such liquidation in the form and manner prescribed by the Secretary of the Treasury, and collect any increased or additional duties due or refund any excess of duties deposited as determined on such liquidation.

The four cases were before the Customs Court on motions by the Government seeking dismissal of appellees' protests on the ground that the protests were filed after the expiration of the 60-day period prescribed in section 514 of the Tariff Act of 1930. Section 514 reads:

> Except as provided in subdivision (b) of section 516 of this Act (relating to protests by American manufacturers, producers, and wholesalers), all decisions of the collector, in-

cluding the legality of all orders and findings entering into the same, as to the rate and amount of duties chargeable, and as to all exactions of whatever character (within the jurisdiction of the Secretary of the Treasury), and his decisions excluding any merchandise from entry or delivery, under any provision of the customs laws, and his liquidation or reliquidation of any entry, or refusal to pay any claim for drawback, or his refusal to reliquidate any entry for a clerical error discovered within one year after the date of entry, or within sixty days after liquidation or reliquidation when such liquidation or reliquidation is made more than ten months after the date of entry, *shall, upon the expiration of sixty days after the date of such liquidation,* reliquidation, decision, or refusal, be final and conclusive upon all persons (including the United States and any officer thereof), *unless the importer,* consignee, or agent of the person paying such charge or exaction, or filing such claim for drawback, or seeking such entry or delivery, *shall, within sixty days after, but not before such liquidation,* reliquidation, decision, or refusal, as the case may be, as well in cases of merchandise entered in bond as for consumption, *file a protest* in writing with the collector setting forth distinctly and specifically, and in respect to each entry, payment, claim, decision, or refusal, the reasons for the objection thereto. The reliquidation of an entry shall not open such entry so that a protest may be filed against the decision of the collector upon any question not involved in such reliquidation. [Emphasis ours.]

The merchandise involved was imported into San Juan between April 1957 and December 1959. It was assessed with duty at the rate of 36 cents a pound (roasted coffee and ground coffee) and 30 cents a pound (coffee preparation) under section 319 of the Tariff Act of 1930 and Act No. 4 of July 11,

1935 of the Legislature of Puerto Rico, as amended by Resolution of the Secretary of Agriculture and Commerce of Puerto Rico, approved by the Governor of the Commonwealth of Puerto Rico on April 18, 1957, under authority of Act No. 77, approved on May 5, 1931, as amended by Act No. 95 of June 21, 1955. The entries involved were liquidated between June 1957 and December 1959 and the protests were filed between March 1960 and November 1960, each of the involved protests being filed after the 60-day period provided for in section 514 had expired.

A common basis for appellees' protests was the decision of the Customs Court in *Pan American Standard Brands, Inc.*, v. *United States*, 43 Cust. Ct. 122, C.D. 2115, "basically made under date of 15 September 1959," which decision was made final "after a rehearing under date of 19 February 1960" and was not appealed. In *Pan American*, the Customs Court held unconstitutional, as an unlawful delegation of legislative power, the provision of Act No. 95 which empowered the Secretary of Agriculture and Commerce of Puerto Rico to modify, without any guidelines or standards, the rates of duty levied by Act No. 95. It also held invalid the resolution of the Puerto Rican Secretary of Agriculture and Commerce, issued under said statutory provision, and certain duty assessments on coffee imported into Puerto Rico made pursuant to said resolution. The duty rates struck down in *Pan American* represented an increase of 100 per centum over the lawful rates existing prior to April 18, 1957.

The Customs Court in all four cases before us dismissed the protests, not on the ground that they were filed too late, but, on the basis that they were prematurely filed.[1]

[1] The same judge in the Customs Court dissented from each of the four decisions and would have dismissed the protests on the ground that they were filed too late.

The Government argues that the Customs Court lacks jurisdiction over the protests as they were filed after the expiration of the 60-day period prescribed in section 514 of the Tariff Act of 1930. It urges that the majority opinion of the Customs Court failed to differentiate between cases involving (1) complete liquidations in which there has been compliance with all the procedural requirements of liquidation, and which must be challenged by timely protests; and (2) incomplete liquidations, which may be challenged on procedural grounds at any time prior to compliance with the necessary procedures. The Government contends that where the liquidation is found to be incomplete because the collector has not performed all the procedural acts required in liquidating the entries, there has actually been no final legal liquidation and, as a consequence, the protest is properly dismissed as premature and the collector is properly directed to complete the liquidation so that the importer may have an opportunity to question its legality by timely protest. The Government urges, on the other hand, that where a complete liquidation has been made in compliance with all the procedural requirements, as is alleged here, the question of the constitutionality of the statute under which the liquidation was made can be raised only by a timely protest.

Appellees and amicus curiae [2] urge that a liquidation incorporating a rate of duty which derives its only authority from an "unconstitutional statute" is "no liquidation" which will support a protest nor commence running the statute of limitations within the meaning of section 514.

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[2] The firm of Sharp & Bogan moved before this court for leave to appear as amicus curiae and to file a single brief in CA 5130, CA 5133, CA 5134 and CA 5135, which motion this court granted on August 26, 1963.

Appellee in CA 5133 further urges that the notices of liquidation involved in CA 5133 "were not posted" and that they should be considered "incomplete, invalid and void."

All four appeals present an identical dispositive issue: Whether protests against the collector's liquidations of duties between June 1957 and December 1959 under a provision of a statutory enactment subsequently ruled unconstitutional by the Customs Court in a decision which became final on February 19, 1960, will lie when the protests were filed more than 60 days [3] after the date the liquidations were made.[4]

The court below found that such protests will not lie since they were prematurely filed, and ordered the Collector of Customs at the Port of San Juan, Puerto Rico, to liquidate the entries "so that a timely protest may be filed against the liquidations if so desired." It proceeded on the theory that the provision

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[3] The records indicate the following:

	Liquidations made	*Protest filed*
CA 5130	June 1957–Sept. 1959	July 21, 1960
CA 5133	Jan.–Feb. 1958	Nov. 30, 1960
CA 5134	Aug.–Nov. 1957	Aug. 4, 1960
CA 5135	July–Dec. 1957 (4 entries)	June 22, 1960
	Aug. 1957–Dec. 1959 (63 entries)	March 25, 1960 (refiled July 15, 1960)

[4] Concerning the merits of the four cases, the Customs Court in CA 5130 referred to the following statement made by the Government's attorney:

"Mr. SKLAROFF: We can concede on the merits plaintiff has a case, in that the merchandise in issue is the same in all material respects to C.D. 2115, and if he gets over the hurdle of timeliness, we concede.

"Judge LAWRENCE: That in the opinion of the attorney for the defendant, the plaintiff is entitled to judgment provided the protest is timely?

"Mr. SKLAROFF: I have been so informed by the Chief Liquidator here, and the Customs officials here, with respect to all the other cases."

of Act No. 95 under which the liquidations were made, having been found unconstitutional, was not a law; that it was inoperative and afforded no basis for the alleged liquidations and subsequent protests; that its invalidity dates from the time of enactment; and that although in some situations, where a statute is declared to be unconstitutional, there may be a question of vested rights and of public policy which cannot be erased by a new judicial determination, no such factors have been presented in the cases at bar. We find no reversible error in those findings.

This court has held in *United States* v. *Astra Bentwood Furniture Co.*, 28 CCPA 205, C.A.D. 147, that a liquidation made under section 505 is void when the "notice of such liquidation" is not given "in the form and manner prescribed by the Secretary of the Treasury" and that such a liquidation, being not a final legal liquidation, is not within the bar of the statute of limitations under section 514. As a consequence a protest against such a liquidation, although filed after the 60 day period prescribed in section 514, is dismissible as being premature. In the *Astra* case it appeared from the record that neither the correct date of the involved entry nor the name of the importer were given on the bulletin notice of the liquidation of the involved entry, and that no notice was ever posted in conformity with the procedure for liquidation set forth in article 820(h) of the Customs Regulations of 1931. The protest was filed three years after the defective bulletin notice was posted, and five days after the Commissioner advised the collector that the request of the importer to post a notice of liquidation of the involved entry was denied. In that case, this court stated:

> In the instant case, it is clear that the provisions of article 820(h) have not been complied

> with. We are of opinion that as the collector failed to give the notice required by article 820(*h*), * * * the 60-day period after the liquidation within which the importer might protest, as provided in section 514, * * * has not commenced to run.

It further was unable to find any provision in section 514 which would warrant a holding that the 60-day period within which the importer might protest commenced to run on the date of the refusal of the collector to post the notice of his liquidation in the form and manner required by law, and concluded:

> We hold, therefore, that there has been no final legal liquidation of the involved entry against which, within the purview of section 514, * * * the importer may "within sixty days after, but not before such liquidation" file a protest; that the protest in the instant case is premature, and, therefore, untimely, and should have been dismissed by the trial court.
>
> In conclusion, we think it proper to say that it is the duty of the collector to complete his liquidation of the entry in the manner provided by law so that the importer, if it sees fit to do so, may protest the liquidation within the time prescribed by section 514, * * *.

The Government concedes that "procedural questions" such as the Government's failure to give a "complete" notice of liquidation as in the *Astra* case "may be raised at any time" prior to the collector's compliance with and completion of the proper liquidating procedures on the ground that there has been no final legal limitation of the involved entry to start the running of the statute of limitations within the purview of section 514. On the other hand, the Government contends that a liquidation which has been made in compliance with all procedural requirements of liquidation but which was based on a provision of

a statute subsequently held to be unconstitutional can be challenged only by a timely protest. We are unable to find any reasonable basis for that distinction. As with a liquidation involving "procedural questions," we think that a liquidation based on an unconstitutional provision of a statute is not a final legal liquidation to start the running of the statute of limitations within the purview of section 514.

Section 505, which authorizes liquidation, mandatorily requires the Collector of Customs to give notice of liquidations not only "in the form and manner prescribed by the Secretary of the Treasury" but also "as provided by law." We do not think that a liquidation made pursuant to a provision of a statute subsequently declared to be unconstitutional is a liquidation "as provided by law." As the Supreme Court stated in *Norton* v. *Shelby County,* 118 U.S. 425, 442 (1886):

> * * * An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.

We further think that the language itself in section 514 indicates that Congress did not intend the 60-day requirement in section 514 to be completely controlling in every case. Thus section 514 requires that protests be filed within 60 days after a liquidation, *but not before* a liquidation.

What, then, is the proper case which Congress intended will stay the 60-day requirement? It seems to us that a liquidation based on an unconstitutional provision of a statute would certainly involve such a case since an unconstitutional provision of a statute is void *ab initio.*

We recognize that in some situations, when a statute is declared unconstitutional, there may be questions of vested rights and of public policy which cannot be erased by a new judicial determination.[5] However, we agree with the Customs Court that no such factors have been presented in the cases at bar.

We find no merit in the Government's contentions that if a liquidation based on an unconstitutional statute is to be opened by late protest, customs officials will be required to retain records and documents indefinitely and that this would be contrary to law.[6] We think Congress intended that administrative housekeeping regulations should bow to constitutional supremacy. Moreover, if liquidation records should be destroyed, we agree with the amicus curiae that the necessity for the plaintiff in every action raising the validity of a liquidation to establish the relevant facts by competent evidence would prevent any hardship on the Government. In *Olavarria & Co., Inc.* v. *United States,* 47 CCPA 65, C.A.D. 729, an importer contended that it was under no obligation to file protests because notices of liquidation were never given by the Government in the manner required by law. In that case there was no evidence relating specifically to the notices of liquidation of the merchandise, official papers having been destroyed as provided by law. This court, in finding for the Government stated that:

> It is, of course, presumed that public officials perform their duties in the manner required by law. *V. Mueller & Co.* v. *United States,* 28

[5] See Sutherland, Statutory Construction, § 111 (1964).

[6] The Government states that at least one or more of the involved entries was destroyed in accordance with the General Services Administrative Records Control Schedule, Bureau of Customs Comprehensive Schedule No. 2, Part VI, approved in House Report 2605, 83rd Congress, Second Session, August 3, 1954, as provided for in 44 U.S.C. 366–380.

> CCPA 249, C.A.D. 152; *United States* v. *Henry W. Peabody & Co.*, 40 CCPA 59, C.A.D. 498. It was therefore incumbent on the importer to show by competent evidence that notice of liquidation of the merchandise was not given in the manner required by the applicable statutes and regulations, * * *

It has been suggested by the Government that appellees' protests are barred by laches, although it is conceded that this defense was not raised at the trials below. When laches is not raised below, we do not think it is available on appeal. See *United States* v. *Webb*, 16 Ct. Cust. App. 156, T.D. 42790.

Therefore, we agree with the dismissal of the involved protests by the Customs Court for the reason that the protests have been prematurely filed, and consider that it is the collector's duty to assess duties against the involved entries and liquidate the same in the manner provided by law.[7]

The judgments of the Customs Court are *affirmed*.

AFFIRMED.

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

Thursday, June 18, 1964

(Caption omitted)

Said appeals having heretofore been brought on to be heard before the court and due consideration thereon having been had, it is—

ORDERED that the judgments of the United States Customs Court be, and the same are hereby, affirmed.

---

[7] Since we find that the Customs Court properly dismissed the protests as being premature on the ground that they were based on an unconstitutional provision of a statute, the question of the legality of the notices of liquidation in CA 5133 becomes moot.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

THE UNITED STATES OF AMERICA,
Petitioner,

v.

C. O. MASON, INC., *et al.*

BRIEF FOR C. O. MASON, INC. IN OPPOSITION.

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BRIEF FOR C. O. MASON, INC. IN OPPOSITION.

Opinions Below.

The opinion of the Court of Customs and Patent Appeals is reported at C. A. D. 844 and has been reprinted by petitioner in its Appendix. The opinion of the Customs Court is reported at 49 Cust. Ct. 89 and is reprinted herein as an Appendix.

Jurisdiction.

Petitioner seeks to invoke jurisdiction under 28 U. S. C. §1256.

Statement of the Case.

The United States has petitioned for a writ of certiorari to review a decision adverse to it below by the United States Court of Customs and Patent Appeals, which

in turn affirmed a decision adverse to the United States by the United States Customs Court, Third Division.

This action was brought to recover duties on imported coffee unconstitutionally assessed against respondent C. O. Mason, Inc. and liquidated by the Collector of Customs at the Port of San Juan, Puerto Rico. The rates were fixed by the Secretary of Agriculture and Commerce of Puerto Rico pursuant to Act No. 95 of the Legislature of Puerto Rico (13 L. P. R. A., Sec. 2201, Supp.), which Act was declared unconstitutional by the Customs Court in *Pan American Standard Brands, Inc., et al.* v. *United States,* 43 Cust. Ct. 122, C. D. 2115. In *Pan American,* the court held that the delegation of authority from the Legislature of Puerto Rico to the Secretary of Agriculture and Commerce to increase or decrease the duty on coffee imported into Puerto Rico was without proper safeguards and, therefore, an illegal delegation of legislative power. The court further held that the resolution of the Secretary of Agriculture and Commerce pursuant to said statute, increasing the duty on imported coffee, was invalid. The government took no appeal from that decision which became final on February 19, 1960.

The entries involved in this case were liquidated between June 10, 1957 and September 11, 1959. Respondent filed a protest on July 21, 1960 against the Collector for his refusal to liquidate these entries in accordance with the rates prevailing prior to the illegal order of the Secretary of Agriculture and Commerce. The Collector denied the protest on the ground that respondent had not filed its protest within 60 days of liquidation pursuant to Section 514 of the Tariff Act of 1930.

Respondent had made 29 coffee entries involving a total duty assessment of $36,747 (Transcript of Record, p. 9).

The duty rates struck down in *Pan American* represented an increase of 100 per centum over the lawful rates existing prior to April 18, 1957, hence the refund of duties at issue here is one-half that amount, i.e. $18,373.50.

The Customs Court, in four cases raising identical issues, ruled that the assessment and liquidation of the duties were void, and dismissed the protests to the liquidations, not on the ground that they were filed too late, but on the basis that they were prematurely filed.

The government appealed that decision to the Court of Customs and Patent Appeals where it urged that the opinion of the Customs Court "failed to differentiate between cases involving (1) complete liquidations in which there has been compliance with all the procedural requirements of liquidation, and which must be challenged by timely protests; and (2) incomplete liquidations, which may be challenged on procedural grounds at any time prior to compliance with the necessary procedures." (Opinion below, petition, p. 5a). The government contended that where the Collector had not performed all the acts required of him in liquidating entries, there has actually been no final "legal liquidation" and, as a consequence, the protest should be properly dismissed as premature, the Collector directed to reliquidate so that the importer would have an opportunity to question its legality by timely protest. (Opinion below, petition, p. 5a). It claimed, however, that where the Collector had performed all of his required acts that the question of the constitutionality of the statute under which he operated could be raised only within 60 days. (Opinion below, petition, p. 5a). Respondent contended that a liquidation made on the sole authority of an unconstitutional statute was not a legal liquidation effective to support a protest or commence the running of the Statute of Limitations provision of Section 514 of the Tariff Act.

The Court of Customs and Patent Appeals stated the issue before it as follows: Whether protests against the Collector's liquidations of duties between June 1957 and December 1959 under a provision of a statutory enactment subsequently ruled unconstitutional by the Customs Court in a decision which became final on February 19, 1960, will lie when the protests were filed more than 60 days after the date the liquidations were made.

The opinion of the Court of Customs and Patent Appeals affirming the decisions and judgments of the Customs Court was unanimous.

Argument.

This case involves a narrow question of customs law. The government would now urge that it presents consequences ranging far beyond the imagination of the two courts which have decided adversely to it below. The decision below evidences none of the imaginary horribles set forth in the petition as grounds for granting certiorari. It simply interprets two related provisions [Sections 505 and 514] of the Tariff Act of 1930 under existing customs decisions.

1. The government informs this Court that Section 514 of the Tariff Act of 1930—and its policies of repose—are defeated by the decision below since under that statute "No plainer language could be employed to indicate that *all* determinations of the Collector, regardless of their basis, are to be final and conclusive unless challenged within sixty days" (Petition, p. 10).

Yet it was the government itself which urged upon the Court of Customs and Patent Appeals the argument that certain categories of liquidations, which it termed "incom-

plete'' and which raised ''procedural questions,'' might be challenged *at any time* irrespective of the expiration of the 60 day limitations period of Section 514 while others were ''substantive'' and had to be raised in 60 days (Brief for the United States, Court of Customs and Patent Appeals, p. 21). The Court below noted that ''substantive-procedural'' contention as the government's principal argument (Opinion, reprinted in petitioner's Appendix, p. 5a) and rejected it:

> ''We are unable to find any reasonable basis for that distinction. As with a liquidation involving 'procedural questions,' we think that a liquidation based on an unconstitutional provision of a statute is not a final legal liquidation to start the running of the statute of limitations within the purview of section 514'' (Petitioner's Appendix, p. 9a).

It ill behooves the government to contend at this time that Section 514 cuts off all challenges to a Collector's liquidation when it offered a line of customs cases establishing the right to challenge such acts at any time subject only to the doctrine of laches. (Brief for the United States below, pp. 21-30).

The question before the court below turned on whether this case belonged in the existing line of customs decisions holding that certain acts of the Collector did not result in a ''final legal liquidation'' such as to commence the running of the 60 day statute.

In the customs field the doctrine of void liquidations existed for many years. *United States* v. *Passavant,* 169 U. S. 16. A variety of actions and failures to act on the part of customs officials have been held to void liquidations in such a manner that filing of both protests and appeals for reappraisement are not confined to the statutory period.

In *United States* v. *Passavant, supra,* this Court held that the valuation of an appraiser was not conclusive and binding upon all parties ". . . where the appraiser or collector has proceeded on a wrong principle contrary to law or has transcended the powers conferred by statute." (169 U. S. 21).

Subsequent decisions by the Court of Customs and Patent Appeals have applied this principle in situations where a limitations period has run. Action by customs officials proceeding on a wrong theory of law result in a void appraisement and consequently an equally void liquidation, permitting challenge to such action to be made by protest after the statutory period to appeal the appraisement. *James S. Kean* v. *United States,* 20 C. C. P. A. (Customs) 388, T. D. 46186 (1933). In *Stubbs* v. *United States,* 7 Ct. Cust. App. 399, T. D. 36967 (1917), the Court of Customs and Patent Appeals found neither the government nor the importer bound by the action of a collector who had acted on an assumption of certain authority which was wholly denied him under the applicable statute. The Court stated that the attempted liquidation in that case ". . . was not simply voidable but . . . was absolutely null and void. . . . The collector possessed no statutory power or authority at the time to make any liquidation" (*Id.,* 403). The overreaching by the collector in the *Stubbs* case having resulted in an absolutely null and void liquidation, it was held that said liquidation did not operate to commence the statute of limitations to run.

Similarly, as noted by the opinion below, in cases where the collector has failed to give notice of liquidation, or to post such notice in accordance with applicable regulations, liquidations have been considered void and ineffective to support a protest. *United States* v. *Astra Bentwood Furni-*

ture Co., 28 C. C. P. A. (Customs) 205, C. A. D. 147 (1940); *Standard Oil of La.* v. *United States*, 33 C. C. P. A. (Customs) 152, C. A. D. 329 (1946); *Lorraine Fibre Mills, Inc.* v. *United States*, 38 Cust. Ct. 94, C. D. 1848 (1957). In addition, failure to give notice of appraisement voids a liquidation based upon it despite expiration of the statutory appeal period. *United States* v. *James H. Rhodes & Company*, 40 C. C. P. A. (Customs) 1, C. A. D. 488 (1952).

Thus, it is well established in customs law that a liquidation judicially declared to be "void" is a mere nullity, and failure to protest it within sixty days cannot make it binding and conclusive upon either the importer or the United States.

The only new question below was whether a liquidation made on the sole authority of a statute subsequently ruled *unconstitutional* fitted within the existing doctrine of "void liquidations" so as to be legally ineffective to commence the running of the 60 day limitations period, not being a liquidation "as provided by law." Whatever the application of *Norton* v. *Shelby County*, 118 U. S. 425, 442, or the exceptions thereto, within the narrow ambit of customs law, the court below saw no reason to depart from its general rule.

The government itself conceded below the existence of cases where the Collector had overlooked an importer's successful appeal to the Customs Court, had liquidated the entries at the higher value determined by the government's appraiser, and was unable to prevent challenge by protest filed after the 60 day period. *Nozaki Bros., Inc. and Frank Dow, Inc.* v. *United States*, 41 Cust. Ct. 245, C. D. 2048 (Brief of United States, below p. 28). Significantly, the court in the *Nozaki* case stated (p. 251):

> "When we say that the liquidations herein are void we use the term in its literal and absolute sense,

> meaning that an act so characterized is an absolute nullity wholly lacking in legal efficacy, unable in law to support the purpose intended, incapable of ratification, confirmation or enforcement in any manner or to any degree. . . . The term 'void' as we here apply it to those liquidations connotes utter negativeness which is the equivalent of nonexistence. Void things are in legal effect no things.
>
> "It seems to be the position of counsel for the defendant that even if these liquidations are void, plaintiffs' remedy would be timely protest and in the absence of such protest his liquidations become final and binding.
>
> "The fallaciousness of this argument is readily apparent. If these liquidations are void in the sense that a void act is no act, there are clearly no liquidations against which protest could be filed. Under the express terms of §1514, *supra*, protests may not be filed before liquidation. Therefore, the protests herein are premature."

The government termed the *Nozaki* case wrongly decided (Brief below, p. 28). It now ignores the existence of such cases (petition, p. 9), citing examples of how erroneous or whimsical liquidations of a Collector could be fitted within the decision of the court below. The point is that many acts of the Collector of Customs have already been held so void as not to commence the running of the 60 day limitations period. The decision below is a narrow one fitting this case into that line of cases. The government is well aware of the cases for it asserted its own "substantive-procedural" dichotomy below and attempted to distinguish those precedents which it thought unhelpful. It cannot now claim that *all* determinations of the Collector are final and conclusive unless challenged within 60 days in order to convey an impression that the decision below emasculated

a limitations period. The Court of Customs and Patent Appeals was simply unpersuaded that the line of customs authority advanced by the government was applicable. It left intact all of previously existing customs law interpreting the 60-day limitations statute.

2. The petition asserts that the decision below is inconsistent with principles of limitations statutes. Suffice to state that we are not here concerned with anything other than the very unusual procedure established by Congress in Sections 505 and 514 of the Tariff Act for the filing of timely protests of liquidations. Section 514 is a uniquely short limitations provision, rather more similar to a court rule for timely filing of an appeal than to the common 2-6 year periods found in most statutes of limitation. It is peculiar to the customs area. It should not be unthinkingly analogized to other types of limitations statutes and, in our view, could not be.

Section 514 provides that protests be filed "within sixty days after, but *not before* such liquidation". (Emphasis added.) For many years under customs law the legal question has been whether a legal liquidation has taken place since a protest cannot be filed *before* a "liquidation" has taken place as well as 60 days *after* that operative legal act. Where the courts have felt that a proper "liquidation" has not taken place, they have reasoned that the protests must be dismissed as *prematurely* filed, in order that the collector may liquidate in the manner provided by law. The claimant can then file another "mature" protest if he is so inclined after the collector has re-liquidated so as to cure the defect in his first action. This statute and its progeny of case law are peculiar to the customs field.

3. The Court below considered the intention of Congress in putting an end to matters in controversy. It found that the language of the statute itself did not evidence an intention that the 60-day requirement of Section 514 be applicable in every case. (See opinion below, petition, p. 9a). The decision no more defeats the policies of repose embodied in Section 514 than do all of the existing cases establishing the doctrine of void liquidations, which has been accepted in the customs field since 1898.

Kavanagh v. *Noble*, 332 U. S. 535, relied on by petitioner, involved an entirely different statute. Further, the question there was which of either a four year or a two year limitation statute applied in the context of a limitations policy entirely distinct from that in the customs area. In *Kavanagh* a Treasury regulation was "set aside" by later court decision. Also, the statute there ran from the time of the taxpayer's overpayment, not from any act of the administrator based on the regulation. The present case concerns the situation of a statute declared unconstitutional where the administrator acted solely on the basis of that statute and only his "legal" action would have commenced the running of the short limitations period.

4. The petition recites a parade of horribles. It would appear appropriate to await some evidence of the "threat" this decision poses to other federal statutes by other courts. The Solicitor General is well qualified to protect the interests of the government as they actually arise without undertaking the additional burden of speculating on evils which may arise from citation of the decision below by others in non-customs cases.

The government takes the strange position of stating that the decision is obviously wrong (petition, p. 7), but that other federal courts are going to go out of their way

to follow such a glaringly wrong decision in other areas (petition, p. 12).

It is customary to await the occasion of a conflict between decisions of federal courts prior to the exercising of this Court's discretionary review power (Rule 19, 1.(b) and 2., Rev. Rules of the Supreme Court of the United States). This Court does not sit to review every alleged error made below, particularly in technical areas where Congress has created a court designed to possess technical expertise.

5. This case was argued in a narrow compass (see Statement of the Case, *supra*), decided in a narrow compass (see opinion below) by a court established for that very purpose. It is difficult to visualize how it could now be cited outside this area. The government does not claim that this particular application of Section 514 has any great practical significance in the customs area, since it admits that tariff statutes are rarely declared unconstitutional (petition, p. 12). It professes concern, however, over the dissimilar situation where other actions are later set aside. The point is that this decision is clearly limited to the tariff statute which is declared unconstitutional and stands only for that. We submit that certiorari is not granted on the basis of speculation or surmise in order to head off problems which may or may not arise. The government has ample opportunity to protect its legal position in later cases should they arise.

6. The petition states the decision "opens the door to constitutional attacks upon countless tariff provisions" (petition, p. 13). We fail to see in what manner constitutional attacks, which are lacking in merit, are encouraged by the decision. We would assume that those attacks which are well taken would stand or fall on their own merit.

7. We are told that the decision is so obviously wrong that it warrants review and yet the only case which the government relies on heavily (*Kavanagh* v. *Noble, supra*) has nothing to do with the area of customs law, and is completely distinguishable from the instant case as demonstrated above. Assuming *arguendo* for the moment that this Court would grant certiorari, it is relevant to ask what the posture of the case would then be. Simply stated, the Court would then be asked to either adopt the principle urged by the government in its petition which would require reversal not only of this case, but of all the customs cases cited above, thus upsetting many years of decided customs cases, or it would be asked to adopt the government's original "substantive-procedural" dichotomy, which has thus far been rejected by every court to which it has been offered.

8. It is respectfully submitted that the principle announced by the Court below cannot realistically be said to transcend customs litigation. The decision is peculiarly based upon an interpretation of Section 514. The government says similar reasoning could be employed to challenge the limitations periods under the Tucker Act or the Suits in Admiralty Act. The latter provision (46 U. S. C. §745) is entirely dissimilar to Section 514, providing for a 2-year period *after a cause of action arises,* thus clearly geared to an entirely different body of established case law. As to the Tucker Act, an elaborate body of case law already exists in the Court of Claims under its limitation provision (28 U. S. C. §2501) part of which is geared to "accrual of a claim", part to "termination" of river and harbor improvements, part to "cessation" of a disability. No logical reason appears why a customs decision should be employed to subvert years of decided Court of Claims cases

interpreting a different act. The petition asserts (p. 13) that the only requirement to create such a threatening situation would be "a contention" that an administrator had acted on the basis of an unconstitutional statute. We respectfully note that here involved was not a "contention" but a judicially declared status of unconstitutionality.

9. The government notes (petition, p. 8) that the principles here involved are identical to those decisions of this Court holding litigants to the particular procedures established for challenging actions of government officials. We accept that principle and respondents have followed it throughout by rigorously complying with the procedure set out by the Tariff Act of 1930, and the decisions interpreting Section 514. The cases cited by the government, however, concern the failure of a litigant to exhaust administrative remedies. That is not the situation here involved.

10. The government has adverted to the effect of the decision to open stale litigation. The government itself urged below that challenges to "procedurally incomplete liquidations" might be raised at any time, *subject to the claim of laches.* (Brief of United States below, p. 21) Should the government realistically be concerned over the prospect of such stale claims, it cannot be questioned that the doctrine of laches is available to it. The government suggested below that the protests here were barred by laches. The Court of Customs and Patent Appeals noted that this defense was not raised at the trials below and where it is not so raised it is not available on appeal. (Opinion, p. 11a) It would, however, always be available to the government when properly raised.

Conclusion.

The decision below has importance to the individual litigants, possibly to some persons concerned with customs matters, but clearly to no others. It involves a rather narrow question in the technical customs area. It was correctly decided below by two courts and does not raise any special or important question warranting the time or the concern of this Court. It is respectfully submitted that the petition should be denied.

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APPENDIX.

Decision of the Customs Court.

(C.D. 2364)

C. O. MASON, INC.

v.

UNITED STATES

Coffee—Administration

• • • •

United States Customs Court, Third Division
Protest 60/19760-684 against the decision of the collector of customs at the port of San Juan

• • • •

(Decided October 8, 1962)

• • • •

RICHARDSON, Judge: The merchandise that is the subject of the instant protest consists of coffee which was imported at San Juan, P. R. The importations are covered by some 29 separate entries. The protest is before this court on a motion made by defendant's counsel at the trial attacking the protest and seeking its dismissal under 19 U. S. C. A., section 1514 (§514, Tariff Act of 1930), on the ground of untimeliness.

Section 1514, *supra*, reads:

> Except as provided in subdivision (b) of section 1516 of this title (relating to protests by American manufacturers, producers, and wholesalers), all decisions of the collector, including the legality of all orders and findings entering into the same, as to the rate and amount of duties chargeable, and as to all exactions of whatever character (within the jurisdiction of the Secretary of the Treasury), and his decisions excluding any merchandise from entry or delivery, under any provision of the customs

> laws, and his liquidation or reliquidation of any entry, or refusal to pay any claim for drawback, or his refusal to reliquidate any entry for a clerical error discovered within one year after the date of entry, or within sixty days after liquidation or reliquidation when such liquidation or reliquidation is made more than ten months after the date of entry, shall, upon the expiration of sixty days after the date of such liquidation, reliquidation, decision, or refusal, be final and conclusive upon all persons (including the United States and any officer thereof), unless the importer, consignee, or agent of the person paying such charge or exaction, or filing such claim for drawback, or seeking such entry or delivery, shall, within sixty days after, but not before such liquidation, reliquidation, decision, or refusal, as the case may be, as well in cases of merchandise entered in bond as for consumption, file a protest in writing with the collector settting forth distinctly and specifically, and in respect to each entry, payment, claim, decision, or refusal, the reasons for the objection thereto. The reliquidation of an entry shall not open such entry so that a protest may be filed against the decision of the collector upon any question not involved in such reliquidation. (June 17, 1930, ch. 497, title IV, §514, 46 Stat. 734.)

There appears to be no dispute concerning the essential facts which prompted the Government's attorney to make the motion to dismiss. It appears that the involved entries were liquidated at various times between June 1957 and September 1959. The instant protest, which is addressed to these liquidations, was filed with the collector on July 21, 1960. It reads in part:

> Protest is hereby made against your liquidation assessing duty on entries listed below, subject of this

communication. The reaons for the objection under Section 514 of the Tariff Act of 1930, as amended, are as follows:

> The imported merchandise covered by the below-listed entries was improperly classified by you, in our opinion, as follows under regulations existent at that time.
>
> 1. Namely this covers ground coffee and instant coffee received from the Maxwell House and Sanka Divisions of the General Foods Corporation, on which duty was paid in the amount of 36 cents per pound on the regular ground coffee, and 30 cents per pound on the raw coffee used in preparation of the instant coffee.
>
> 2. Whereas, it is our belief that coffee during the covering period should have been charged duty in the amount of 18 cents per pound on the ground coffee, and 15 cents per pound on the raw coffee used in the preparation of the instant coffee.
>
> This protest is based on Custom Court Ruling basically made under date of 15 September 1959, which protest was made final after a re-hearing under date of 19 February 1960.
>
> On the basis of the above, request is hereby respectfully made for a reliquidation of the enclosed series of entries.

Concerning the merits of the controversy, the Government's attorney made the following statement (R. 2-3):

> Mr. Sklaroff: We can concede on the merits plaintiff has a case, in that the merchandise in issue is the same in all material respects to C.D. 2115. and if he gets over the hurdle of timeliness, we concede.

Decision of the Customs Court.

Judge Lawrence: That in the opinion of the attorney for the defendant, the plaintiff is entitled to judgment provided the protest is timely?

Mr. Sklaroff: I have been so informed by the Chief Liquidator here, and the Customs officials here, with respect to all the other cases.

Admittedly, the instant protest was filed well after the expiration of 60 days subsequent to the liquidations here involved. The defendant contends that, by reason thereof, this court lacks jurisdiction over the protest. On the other hand, the plaintiff maintains that the liquidations of the involved entries were void and, as such, are not binding and conclusive. The question which remains for determination is whether the untimely filing of the protest is fatal to plaintiff's right to relief. In this connection, we deem it pertinent to refer to our decision in *Pan American Standard Brands, Inc., et al.* v. *United States,* 43 Cust. Ct. 122, C.D. 2115, which is cited in the briefs of counsel and which was also alluded to in the protest and mentioned on the oral argument of the motion.

In *Pan American Standard Brands, Inc., et al.* v. *United States, supra,* the plaintiffs entered importations of roasted coffee at the port of San Juan, P.R., on April 22, 1957, and May 1, 1957. By an act of Congress (19 U.S.C.A., § 1319) the Legislature of Puerto Rico was authorized to levy customs duties on coffee imported into Puerto Rico. And, by virtue of this authority, the Legislature of Puerto Rico enacted a statute (Act No. 77 of 1931) which, as amended in 1934 and 1935, resulted in a duty levy of 15 cents a pound and 18 cents a pound, respectively, on imports of raw coffee and roasted or ground coffee. Then, on June 21, 1955, Act No. 77 was again amended by the Legislature of Puerto Rico by Act No. 95 (13 L.P.R.A., § 2201, supp.), which reads in part as follows:

§ 2201. Amount of duty; definition

As soon as this Act takes effect all coffee introduced into Puerto Rico shall pay a duty of fifteen (15) cents a pound for raw coffee and eighteen (18) cents a pound if roasted or ground coffee, said duty to be collected by the Federal Customhouse Service established in Puerto Rico, under such regulations as it may promulgate therefor; *Provided, That when market conditions may warrant it and for the purpose of protecting the consumer or the coffee industry, the Secretary of Agriculture and Commerce is hereby authorized, until June 30, 1958, to increase or reduce the duty levied by sections 2201-2205 of this title, after a public hearing to that effect. The reduction or increase determined by the Secretary of Agriculture and Commerce shall be subject to the approval of the Governor. Every resolution increasing or reducing the duty levied shall be accompanied by a statement concerning the consideration borne in mind for making the change;* * * *. (Italics supplied.)

Thereafter, and pursuant to this statute, the Puerto Rican Secretary of Agriculture and Commerce issued, and the Governor of Puerto Rico approved, a resolution, effective April 18, 1957, declaring an increase in the rates of duty on raw coffee and on roasted or ground coffee imported for use, consumption, and sale in Puerto Rico, from 15 cents a pound and 18 cents a pound, respectively, to 30 cents a pound and 36 cents a pound, respectively. Duties were assessed against plaintiffs' importations and the entries were liquidated by the collector pursuant to this resolution of the Puerto Rican Secretary of Agriculture and Commerce.

We sustained the plaintiffs' protests in *Pan American Standard Brands, Inc., et al.* v. *United States, supra,* and

held unconstitutional as an unlawful delegation of legislative power the provision of Act No. 95, *supra*, which empowered the Secretary of Agriculture and Commerce of Puerto Rico to modify, without any guidelines or standards, the rates of duty levied by that statute. We also held invalid the aforesaid resolution of the Puerto Rican Secretary of Agriculture and Commerce, issued under said statutory provision, and the duty assessments made pursuant to said resolution. No appeal was taken by the Government in the case, in consequence of which, our decision became the law of the case.

In the *Pan American Standard Brands, Inc., et al.*, case, the question at issue here, the timeliness of the protest, was not before us. However, the effect of our decision was to declare the duty assessments and liquidations under the entries covered by the protests there involved, void *ab initio*. A decision against the constitutionality of a statute makes the statute entirely null and inoperative, and the invalidity dates from the time of enactment. *Norten* v. *Shelby County*, 118 U. S. 425, 30 L. Ed. 178. In some situations, where a statute is declared to be unconstitutional, there may be questions of vested rights and of public policy which cannot be erased by the new judicial determination, but no such factors have been presented in this case and the plaintiff should be granted relief. Counsel for the defendant concedes that, on the merits, the plaintiff's protest brings it within the ruling in C.D. 2115, and we are of the opinion that the same conclusion should be reached on the plaintiff's claim.

For purposes of ascertaining the time within which a protest against a collector's liquidation must be filed pursuant to section 1514, *supra*, a distinction has to be drawn between a liquidation which is legal, although erroneous and voidable as such, and one which is illegal and absolutely void. See *Stubbs* v. *United States*, 7 Ct. Cust. Appls. 399, 403, T.D. 36967; *United States* v. *Astra Bentwood Furniture Co.*, 28 C.C.P.A. (Customs) 205 C.A.D. 147. A liqui-

dation of the first type is a valid liquidation and stands as such unless and until it is set aside in subsequent proceedings. A liquidation of the second variety is a nullity and cannot support subsequent proceedings based thereon. The language of the protest statute concerns itself with the first type of liquidation. It is addressed to a review of the merits of the collector's decision itself, rather than to the jurisdiction of the collector to render the particular decision. The jurisdictional question is a factor which characterizes the second type of liquidation. It is axiomatic that, unless and until the collector has satisfied all of the jurisdictional requisites attendant upon the liquidating process, there is no liquidation against which a protest under section 1514, *supra,* would lie. With respect to protests taken against such nonexistent liquidations, it must necessarily be concluded that the protests have been lodged before liquidation and are, as such, premature within the meaning of the statute.

In a number of protest cases, the courts have either expressly or impliedly acknowledged and applied this distinction between a voidable (legal) liquidation and a void (illegal) liquidation from the standpoint of the question of timeliness of the filing of the protest. *Olavarria & Co., Inc.* v. *United States,* 40 Cust. Ct. 377, C.D. 2008, affirmed 47 C.C.P.A. (Customs) 65, C.A.D. 729; *United States* v. *Judson Sheldon Division, National Carloading Corp.,* 42 C.C.P.A. (Customs) 202, C.A.D. 594, reversing 32 Cust. Ct. 68, C.D. 1581; *Joseph Ullmann Brokerage Corp.* v. *United States,* 29 Cust. Ct. 254, C. D. 1478, affirmed 42 C.C.P.A. (Customs) 6, C.A.D. 560; *Standard Oil Co. of Louisiana* v. *United States,* 33 C.C.P.A. (Customs) 152, C.A.D. 329, affirming on other grounds 14 Cust. Ct. 146, C.D. 926; *United States* v. *B. Holman, Inc.,* 29 C.C.P.A. (Customs) 3, C.A.D. 164, reversing 4 Cust. Ct. 466, Abstract 43635; *United States* v. *Astra Bentwood Furniture Co.,* 28 C.C.P.A. (Customs) 205, C.A.D. 147, reversing 4 Cust. Ct. 19, C.D. 273. In all of these cases,

the courts first ascertained under the evidence presented whether the liquidations against which the protests were filed were legal or whether such liquidations were illegal. In those cases where the courts concluded that the liquidations were legal, the protests were dismissed as being untimely (too late). With respect to those cases where the courts concluded that the liquidations were illegal, the protests were also dismissed as being untimely, but only because they were prematurely filed.

In our opinion, the same distinction as made in the cited cases between legal and illegal liquidations governs the disposition of the instant protest vis-a-vis *Pan American Standard Brands, Inc.* v. *United States, supra.*

It is true that the subject matter of the cited cases evolved around the propriety of the posting of liquidation notices, while the subject matter of the involved protest concerns itself with the invalidity of the statute and executive resolution supporting the collector's duty assessments on the involved entries. However, we recognize in this difference of fact patterns no distinction in principle. In either case, the involved facts constitute integral parts of the liquidating process. As was stated by the Court of Customs and Patent Appeals in *United States* v. *B. Holman, Inc., supra,* at page 14, "all decisions of the collector involved in the ascertaining and fixing of the rate and amount of duties chargeable against imported merchandise entered for consumption are merged in and become a part of a legal liquidation, and it is a legal liquidation only, so far as the issues here are concerned, against which a protest will lie."

The principle of law followed in the cited cases has not heretofore been and should not be limited in application to the posting of liquidation notice cases. In *Nozaki Bros., Inc.,* and *Frank P. Dow Co., Inc.* v. *United States,* 41 Cust. Ct. 245, C. D. 2048, as in the case at bar, the Government also sought to have the protest dismissed on the ground

that it was filed too late. The collector's liquidation in that case was held to be void, and the protest against such liquidation was dismissed as being premature where the liquidation was made in disregard of the mandate of the court. Apart from the question of timeliness in the filing of a protest against a collector's liquidation, our appellate court held, in *United States* v. *William Heyer*, 31 C. C. P. A. (Customs) 111, C. A. D. 259, that the collector's duty assessment was illegal and void where it was based upon an illegal and void appraisement. And the holding in *United States* v. *William Heyer, supra*, was followed by the Customs Court in *Bluefries New York, Inc.* v. *United States*, 40 Cust. Ct. 515, Abstract 61804, and *Bluefries New York, Inc.* v. *United States*, 39 Cust. Ct. 79, C. D. 1909, wherein protests against liquidations supported by such illegal and void appraisements were dismissed as being premature upon the authority of that case. Inasmuch as it has been held that liquidations based upon void appraisements are void and cannot support protests addressed to them, there appears to be no sound reason why liquidations based upon void statutes and executive resolutions, as in the instant case, should be regarded any differently. We have examined the authorities cited in the defendant's brief, and find nothing in them which suggests that such liquidations should be regarded as being anything but void and incapable of supporting the protests.

For the reasons which we have stated in our opinion in *Pan American Standard Brands, Inc.* v. *United States, supra*, we conclude that the collector's assessment of duties against and the liquidation of the entries covered by the protest at bar are illegal and void. Consequently, it is the collector's duty to assess duties against the involved entries and liquidate the same in the manner provided by law so as to give the plaintiff an opportunity to duly protest against such liquidations if it be so advised. Therefore,

for the reasons stated herein, the protest is dismissed by reason of it having been prematurely filed.

Judgment will be entered accordingly.

RICHARDSON,
J.

Concurring:

JOHNSON,
J.

Dissenting Opinion.

DONLON, Judge: I regret that I am constrained to dissent from the decision of my colleagues and the action that is taken in their judgment. In my view, such decision and judgment are inconsistent with the recent decision and judgment in *Pan American Standard Brands, Inc., et al.* v. *United States,* 43 Cust. Ct. 122, C. D. 2115.

That was our unanimous decision and judgment. We sustained protests seeking to recover duties that had been exacted on imported coffee at the port of San Juan, P. R. Our decision held that Act No. 95 of the Legislature of Puerto Rico (13 L. P. R. A., section 2201, supp.) was an unlawful delegation of legislative power. Finding that the protests had been timely filed, judgment was entered directing the collector to reliquidate the entries and make refund of duties that had been unlawfully exacted.

We did not hold that those protests were premature. In a situation on all fours as to legality of the liquidation, and differing only as to timeliness of protest, we did not hold, as the majority here holds, that the liquidation was void and no right of protest followed. Our decision was that the liquidation could be protested, and that it had been timely protested.

Dissenting Opinion.

The difference here is that plaintiff slept on his statutory right to protest.

Either we were wrong in the case of *Pan American Standard Brands, Inc., supra,* or the majority is wrong here. I joined in that decision and judgment, and I have not changed my opinion. I see no basis for a different decision and judgment here. Liquidations under identical circumstances are not both subject to protest and not subject to protest.

The right to protest an unlawful liquidation is governed by time limitations that are imposed by Congress. Those who seek to sue the United States must do so within the terms of whatever congressional permission is given them to do so. If plaintiff did not file a timely protest, as the statute requires, plaintiff has no right to come before us late demanding a reliquidation, and we should neither direct reliquidation nor entertain the notion that there is a time in the future for timely protest and refund.

Defendant correctly argues that this protest should be dismissed on the ground that it was filed too late. Such a decision is consistent with our decision in *Pan American Standard Brands, Inc., supra.*

DONLON,
J.